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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**APPOINTMENT OF COMMISSIONERS
UNDER THE HAGUE CONVENTION AND
REQUEST FOR JUDICIAL ASSISTANCE**

Referral: Hon. Susan van Keulen, USMJ

**APPOINTMENT OF COMMISSIONERS UNDER THE HAGUE CONVENTION
AND REQUEST FOR JUDICIAL ASSISTANCE – PERMISSION TO TAKE EVIDENCE
BY A COMMISSIONER UNDER ARTICLE 17 HAGUE EVIDENCE CONVENTION 1970
TO THE CANTONAL COURT OF ZÜRICH, COURT ADMINISTRATION,
INTERNATIONAL JUDICIAL ASSISTANCE, FOR THE REQUEST FOR JUDICIAL
ASSISTANCE IN CIVIL MATTERS WITH COPY TO THE FEDERAL OFFICE OF
JUSTICE (FOJ), CENTRAL AUTHORITY FOR THE REQUEST FOR JUDICIAL
ASSISTANCE IN CIVIL AND COMMERCIAL MATTERS:**

The United States District Court for the Northern District of California, located at the San Jose Courthouse, Courtroom 6 – 4th Floor, 280 South 1st Street, San Jose, CA 95113, presents its compliments to the Federal Office of Justice and has the honor of requesting its assistance in obtaining evidence to be used in a civil proceeding now pending before this Court in the above-captioned matter, specifically by permitting commissioners appointed by this Court to take evidence under Article 17 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (“Hague Convention”).

It appears to this Court that Ms. Sabine Borsay, whose professional address is: Erika-Mann-Straße 33, 80636 München, Germany, is a witness in this action and therefore has evidence relevant to this action. It is necessary for the purposes of justice and for the due determination of the matters in question between the parties that Ms. Borsay be examined (remotely) at the Swiss offices of Quinn Emanuel at Dufourstrasse 29, 8008 Zurich, Switzerland, under oath or affirmation. Given that the deposition would take place (remotely) in the canton of Zurich, Switzerland, the competent authority for the granting of this request is the High Court of the Canton of Zurich, International Judicial Assistance, Hirschengraben 13/15, 8021 Zurich 1, Switzerland. As is customary, a copy of the present Letter of Request is sent to the Federal Office of Justice, Central Authority for the Request for Judicial Assistance in Civil and Commercial Matters, Bundesrain 20, 3003 Bern, Switzerland.

This Court, therefore, respectfully requests your assistance pursuant to the Hague Convention in obtaining the oral deposition testimony of Ms. Borsay under the terms set forth in this Letter of Request:

I. SUMMARY OF ACTION

1. This action is properly under the jurisdiction of and is now pending before the United States District Court for the Northern District of California, San Jose Courthouse, Courtroom 6 – 4th Floor, 280 South 1st Street, San Jose, CA 95113, United States of America. The United States District Court for the Northern District of California is fully sanctioned as a court of law and equity and is authorized by Rule 28(b) of the Federal Rules of Civil Procedure to direct the taking of evidence abroad by Letters of Request.

2. The parties to the civil action pending in the United States District Court for the Northern District of California are as follows:

- a. The individual, named Plaintiffs on behalf of the class action are Chasom Brown, William Byatt, Jeremy Davis, Christopher Castillo, and Monique Trujillo (collectively, “Plaintiffs”). Plaintiffs are represented by BOIES SCHILLER FLEXNER LLP, 44 Montgomery Street, 41st Floor, San Francisco, CA 94104, USA; 100 SE Second Street, Suite 2800, Miami, FL 33131; SUSMAN GODFREY L.L.P., 1301 Avenue of the Americas, 32nd Floor, New York, NY 10019, USA; and MORGAN & MORGAN, 201 N. Franklin Street, 7th Floor, Tampa, FL 33602, USA. Correspondence to Plaintiffs can be faxed to Plaintiffs’ representatives at +1 (305) 539-1307, +1 (415) 293-6858, +1 (212) 336-8330 or emailed at the following email addresses: mmao@bsflfp.com, jlee@bsflfp.com, brichardson@bsflfp.com, bcarmody@susmangodfrey.com, srabin@susmangodfrey.com, jyanchunis@forthepeople.com, and rmcgee@forthepeople.com.
- b. The Defendant is Google LLC (hereinafter, “Google”). Defendant Google is a corporation organized and existing under the laws of the State of Delaware, with its headquarters also in Delaware, USA. Witness Sabine Borsay is an individual who is employed by Google as a Senior Product Manager but is a resident of Munich,

Germany. Google is represented by QUINN EMANUEL URQUHART & SULLIVAN, LLP, 191 N. Wacker Drive, Suite 2700 Chicago, IL 60606, USA; 865 S. Figueroa Street, 10th Floor Los Angeles, CA 90017, USA; 51 Madison Avenue, 22nd Floor New York, NY 10010, USA; 1300 I Street NW, Suite 900, Washington D.C., 20005, USA; 50 California Street, 22nd Floor San Francisco, CA 94111, USA. Correspondence to Google can be faxed to their representatives at +1 (312) 705-7401, +1 (213) 443-3100, +1 (212) 849-7100, +1 (202) 538-8100, +1 (415) 875-6700 or emailed at the following email addresses: andrewschapiro@quinnemanuel.com, sb@quinnemanuel.com, violatrebicka@quinnemanuel.com, jomairecrawford@quinnemanuel.com, josefansorge@quinnemanuel.com, carlspilly@quinnemanuel.com, and jonathantse@quinnemanuel.com.

3. This is a data privacy class action brought by and on behalf of Google subscribers who allege their internet use was tracked by Google, from June 1, 2016 to the present (the “Relevant Period”), while browsing the internet from a browser in private browsing mode. TAC ¶ 11. Dkt. 395-

2. Plaintiffs have sued Google for various causes of action including: (1) Federal Wiretap Violations, 18 U.S.C. §§ 2510, *et seq.*; (2) Invasion of Privacy Act Violations, Cal. Penal Code §§ 631 & 632; (3) Violations of The Comprehensive Computer Data Access and Fraud Act (“CDAFA”), Cal. Penal Code §§ 502 *et seq.*; (4) Invasion Of Privacy; (5) Intrusion Upon Seclusion; (6) Breach of Contract; And (7) Violation of California UCL, Cal Bus. & Prof. Code §§ 17200, *et seq. Id.* ¶¶ 202–284.

4. Plaintiffs contend Google has represented that users “are in control of what information [they] share with Google, meaning that they have the power to limit what data Google tracks, collects, and shares with third parties” and that “one way for users to exercise this control is by setting their web-browsing software (used to connect to websites) to private browsing mode.” TAC ¶ 2. Plaintiffs allege that Google “unlawfully intercepted users’ private browsing

1 communications to collect personal and sensitive information...without disclosure or consent.”

2 TAC ¶ 4.

3 5. Google believes all claims should be dismissed because Plaintiffs and the websites
4 consented to Google’s receipt of the data; Plaintiffs fail to state their claims; and Plaintiffs’ claims
5 are barred by the statutes of limitations.
6

7 6. Notices for the deposition of witnesses, including Ms. Sabine Borsay, were served
8 on or about May 19, 2022. The parties have agreed to conduct a remote deposition of Ms. Borsay,
9 who will be located for such deposition in Switzerland, in accordance with Chapter II of the Hague
10 Convention.

11 **II. EVIDENCE REQUESTED**

12 7. The parties have satisfied this Court that Ms. Sabine Borsay has material information
13 related to this pending action for use at trial, and that justice cannot be completely done between the
14 parties without her testimony.
15

16 8. The parties requested that this Court issue the present Letter of Request seeking your
17 assistance in obtaining testimony from Ms. Sabine Borsay. The evidence to be obtained is oral
18 testimony to be taken in Switzerland, and is intended to be used as evidence in the trial for this
19 matter. Ms. Borsay who is a resident of Munich, Germany has consented to voluntarily travel to
20 Zurich, Switzerland for purposes of this deposition. She has been made aware that by being deposed
21 in Switzerland she forgoes rights under German law related to the deposition but that she will have
22 rights under Swiss law. She has been apprised of his rights under Swiss law and has consented to
23 being deposed in Switzerland.
24

25 9. The Court requests assistance in permitting the commissioners appointed by this
26 Court to take testimony from Ms. Borsay, which will be given voluntarily. The topics of examination
27 may include, but are not limited to:
28

1 a. Ms. Borsay's role and duties as an employee of Google.

2 b. Knowledge of private browsing, including Google Chrome Incognito mode for the
3 Chrome browser.

4 c. Knowledge of documents related to and produced in this matter.

5 10. This Court is satisfied that the testamentary evidence is relevant to the pending
6 proceeding and is likely to be used at trial to assist this Court in resolving the dispute presented in
7 the civil action before it. With the approval of this Court, the parties and this Court therefore seek
8 permission to have commissioners take this testamentary evidence for the purpose of using such
9 evidence at trial.
10

11 11. It is requested that the testamentary evidence be given in the English language, and
12 on oath or affirmation. However, it is also requested that a German/English translator be allowed to
13 be present and offer translation assistance, if necessary. It is also hereby requested that the testimony
14 be in the form of a recorded remote deposition testimony via a secure session using
15 videoconferencing technology upon questions communicated to the witness by U.S. counsel of the
16 parties, acting as commissioners. It is requested that the testamentary evidence be given at some
17 time agreeable to all involved in June 2022, on or around June 29 and June 30, 2022.
18

19 12. The parties have agreed on and the Court hereby appoints Mr. Remo Decurtins to
20 serve as commissioner ("the Swiss Commissioner"). Mr. Decurtins is a lawyer with the law firm
21 Quinn Emanuel at Dufourstrasse 29, 8008 Zurich, Switzerland, and admitted to practice as an
22 attorney in Switzerland and New York. In his capacity as commissioner, Mr. Remo Decurtins will
23 complete and oversee the following tasks: liaise with the Swiss authorities, including
24 dispatch/submission of the present Letter of Request to the High Court of the Canton of Zurich,
25 International Judicial Assistance, Hirschengraben 13/15, 8021 Zurich 1, Switzerland, and of a copy
26 of the same to the Federal Office of Justice, Central Authority for the Request for Judicial Assistance
27
28

1 in Civil and Commercial Matters, Bundesrain 20, 3003 Bern, Switzerland; act as an agent of service
 2 for any communication of the High Court of the Canton of Zurich and/or the Federal Office of
 3 Justice to this Court, the parties and Ms. Borsay; invite Ms. Borsay to the deposition once
 4 authorization is granted; verify and confirm the identity of Ms. Borsay before testamentary evidence
 5 is taken; supervise the testimony of Ms. Borsay by remote videoconferencing software from the
 6 Swiss offices of Quinn Emanuel at Dufourstrasse 29, 8008 Zürich, Switzerland; instruct the witness
 7 on his rights and obligations as per Article 21 of the Hague Convention; and ensure that the
 8 testimony is conducted in accordance with those rights and obligations.
 9

10 13. The U.S. counsel of the parties, which the Court upon request of the parties hereby
 11 also appoints as commissioners are the following:

- 12 a. For Plaintiffs: James Lee, from BOIES SCHILLER FLEXNER LLP at 100 SE
 13 Second Street, Suite 2800, Miami, FL 33131, USA.
- 14 b. For Google: Jomaire Crawford, from QUINN EMANUEL URQUHART &
 15 SULLIVAN, LLP at 51 Madison Avenue, 22nd Floor New York, NY 10010, USA.

16 14. In addition to the U.S. counsel and commissioners listed above and of the Swiss
 17 Commissioner, it is also requested that client representatives for each party be allowed to be present,
 18 and that a videographer and a stenographer be present to take and record a verbatim transcript of all
 19 testimony and proceedings in the English language and that the transcript of the testimony be
 20 authenticated. When necessary, persons belonging to the information technology departments of the
 21 law firms of U.S. counsel may enter the rooms where U.S. counsel are remotely attending the
 22 deposition. U.S. counsel, the party representatives, the videographer, and the stenographer may
 23 attend the deposition remotely. The Swiss Commissioner, Ms. Borsay and potentially any of the
 24 appointed other commissioners will attend the deposition by videoconference from the same
 25 location in Zurich. When necessary, a German/English translator will attend, from the same location
 26
 27
 28

1 as Ms. Borsay or remotely. When necessary, persons belonging to the IT department of the Quinn
2 Emanuel law firm where the deposition is held may enter the room where Ms. Borsay is remotely
3 attending the deposition.

4 15. As mentioned, it is requested that the commissioners take Ms. Borsay's testimony in
5 the English language (to which Ms. Borsay has agreed) under oath or affirmation, with potentially
6 a German/English translator being present and offering translation assistance, and that the Swiss
7 Commissioner be allowed to administer such oath or request for affirmation on Ms. Borsay in
8 accordance with United States law, as follows: "Do you swear or affirm that the testimony you are
9 about to provide is the truth, the whole truth, and nothing but the truth?"
10

11 16. It is also requested that after giving testimony, Ms. Borsay be allowed after
12 completion of the transcript to review, submit any errata, and sign the transcript of his testimony,
13 and that the signed, transcribed, and videotaped testimony together with any documents marked as
14 exhibits be transmitted to the parties' U.S. counsel as soon as possible thereafter.
15

16 17. Accordingly, it is hereby requested that you grant assistance and authorize the Swiss
17 and U.S. commissioners appointed above to question Ms. Borsay under oath or affirmation at the
18 remote deposition in June 2022, or at another time determined by you, and that a verbatim transcript
19 and videotape be prepared and be transmitted to the parties' U.S. counsel for submission and use
20 before this Court.
21

22 18. It is also requested that you inform the Swiss Commissioner, this Court, and the
23 parties through their above-mentioned U.S. counsel of your approval of this Court's request and of
24 all relevant dates and times determined by you for the production of the aforementioned requested
25 testamentary evidence of Ms. Borsay. This Court and U.S. counsel hereby appoint Mr. Remo
26 Decurtins to file the necessary application for authorization with you and act as the agent of service
27 in Switzerland for any and all communication from you in this respect. As mentioned above,
28

1 Mr. Remo Decurtins's professional address in Switzerland for purpose of your communications is:
2 Dufourstrasse 29, 8008 Zurich, Switzerland.

3 19. This Court expresses its appreciation to the High Court of the Canton of Zurich and
4 the Federal Office of Justice for its courtesy and assistance in this matter and states that this Court
5 shall be ready and willing to assist the courts of Switzerland in a similar manner when required.
6 This Court is also willing to reimburse (through the Parties) the competent judicial authorities of
7 Switzerland for any costs incurred in executing this request for judicial assistance. This Court
8 extends to the competent judicial authorities of Switzerland the assurances of its highest
9 consideration.
10

11 This Letter of Request is signed and sealed by Order of the Court made on the date set forth
12 below:

13 **SO ORDERED.**

14
15
16 DATED: _____

HON. SUSAN VAN KEULEN
United States Magistrate Judge